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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-713

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

Petitioner,

vs.

SCM CORPORATION,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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REFERENCES AND ABBREVIATIONS USED IN THIS PETITION

"VIP" refers to petitioner Virginia Impression Products Co., Inc.

"SCM" refers to respondent SCM Corporation.

References to SCM's Opening Brief will be to "AOB" followed by the page number, e.g. (AOB 62).

References to SCM's Reply Brief will be to "ARB" followed by the page number, e.g. (ARB 35).

References to the opinion of the Court below will be to "App. A" followed by the page number, e.g. (App. A, 4).

References to the first three volumes of the Joint Appendix are to the page numbers contained therein, e.g., the court's charge to the jury (66-113a). Reference to testimony which is not printed in the Joint Appendix is to the specified Volume of the Record on Appeal, e.g., (RA Vol. XX, 9)

"PX" refers to exhibits numerically marked before trial by plaintiff. (PX 1-PX 1320) Those numbers were used at the trial and not marked with trial numbers as offered. PX numbered exhibits are contained in the Exhibit Volumes filed with the Joint Appendix and are referred to by the exhibit number, e.g., (PX 554).

References to the deposition testimony not included in the Joint Appendix are to the volume and page of the deposition followed by the volume and page number of the Reporter's Transcript in which cited portion of the deposition was read, e.g., (RA Vol. XIX, 101—Vol. XXXIV, 611), indicating by the first citation the volume of the Reporter's Transcript containing the deposition and by the second citation the volume of the Reporter's Transcript at which the deposition testimony was read.

In the Supreme Court of the United States

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No. .....

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

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SCM CORPORATION,

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Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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Petitioner Virginia Impression Products Co., Inc. (hereafter "VIP"), prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on August 30, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The judgment of the District Court followed a jury verdict returned on November 26, 1969. There is no opinion of the District Court.

JURISDICTION

The Court of Appeals filed its decision on August 30, 1971. A Petition for Rehearing and Suggestion for Rehearing in Banc was filed by petitioner on September 20, 1971, in accordance with Rule 40 and Rule 35, Federal Rules of Appellate Procedure. That petition was denied by order dated October 18, 1971 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

In a two-to-one decision, the court below stripped petitioner of a judgment in the amount of $702,000 arising out of respondent SCM Corporation's (hereafter "SCM") *per se* violations of the antitrust laws[1] on the ground that VIP's antitrust claims were barred by general release language contained in a "Settlement Agreement" which had been deemed to be ambiguous by the trial judge and had been determined by the jury not to apply to federal antitrust claims.

The majority of the court below, applying state law, construed this Agreement without reference to extrinsic evidence received by the trial court and held that the federal antitrust claims were barred, notwithstanding that: (i) VIP neither knew of its potential antitrust claims nor intended to release them;[2] (ii) none of the persons actually negotiating[3] the settlement for VIP *or* SCM

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1. Resulting in part from conduct the same Court of Appeals had previously found to be *per se* violations of the federal antitrust laws. *Advance Business Systems and Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Those same practices were subject to a consent decree by respondent before the Federal Trade Commission. See *SCM Corp.* (1970 Trade Cases, ¶ 19,191).

2. ARB 2; Redman 611-614a.

3. The negotiations were conducted in two stages. The first stage involved negotiations between VIP's president and certain SCM personnel and was concerned only with outstanding orders and accounts. After agreement was reached, SCM engaged local counsel to prepare a written agreement. During this second stage of the negotiations, SCM's local

believed it covered antitrust claims; rather, they understood that "those differences" referred to in the Settlement Agreement related only to disputed commercial account items outstanding at the time of VIP's termination as an SCM dealer;[4] (iii) SCM acknowledged that only its own counsel were aware of VIP's possible antitrust claims[5]; (iv) SCM specifically instructed its counsel "not to specify the claims being released"[6]; (v) SCM concealed from VIP the reasons for its termination[7]; and (vi) the petitioner's complaint (which has now been dismissed in its entirety) included claims which arose from violations of the antitrust laws by SCM which occurred *after* the date of the Settlement Agreement.

The questions presented are:

(1) Do not the policies underlying federally created antitrust rights, as recently articulated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)[8] in connection with releases, require a uniformly applied rule of release construction (unencumbered by a particular state's version of the parol evidence rule) under which the scope and effect of a release pleaded as a defense to a federal antitrust claim is to be determined in accordance with the intentions of the parties, ascertained by extrinsic evidence, if necessary?

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counsel prepared the Settlement Agreement, including the general release language, taking care "not to specify the claims being released" in accordance with his instructions from SCM. (Freeman 1291a) Regarding the two-stage negotiations the trial court observed in chambers that "a beautiful argument could be made that they [SCM] led this man [VIP's president] down the primrose path" by leading him to believe only the commercial accounts were being settled and later "slip[ping] that general release in on them. . . ." (RA Vol. XXXIX, 9)

4. PX 1241, Noone 1186a; 1192a; Lett 340-341a; Redman 611-614a.

5. ARB 3, 7.

6. Freeman 1291a.

7. Lett 331-333a, 336-337a, 341a, 377-378a; Rush 1086a; Redman 602a, 611-613a; Noone 734a, 747a.

8. In *Zenith*, this Court held specifically that "* * * the effect of a release upon coconspirators shall be determined in accordance with the intentions of the parties," and that "the straightforward rule is that a party releases only those other parties whom he intends to release." (401 U.S. at ....., S.Ct. at 809-10)

(2) If there is not to be a uniform federal rule governing releases of federal antitrust claims, should not there be, at the very least, a rule requiring that to the extent state law is applied it should comport with and further the policy of the federal antitrust laws, by requiring that the releasor intended to release the antitrust claims before he can be held to have released them?

(3) Can a release bar a claim for damages caused by antitrust violations occurring after the release was signed,[9] or is not such a release void as against public policy?

STATEMENT OF THE CASE

1. The Complaint and Trial

VIP, an independent dealer in photocopy machines and supplies in Richmond, Virginia, brought this antitrust action in the United States District Court for the Eastern District of Virginia, Richmond Division, on March 18, 1968, to recover treble the damages it had suffered by reason of certain practices and policies of SCM.

A. PRE-RELEASE VIOLATIONS.

VIP was terminated as an SCM dealer in furtherance of a photocopy marketing program, which included: (1) the "user policy,"[10] under which SCM required its independent dealers to refuse to sell SCM machines or spare parts it had purchased from SCM to anyone other than the ultimate user of the machine;[11] (2) a requirement prohibiting independent dealers from sell-

9. The court below ordered *dismissal* of petitioner's complaint which contained allegations of antitrust violations and damages occurring subsequent to the execution of the release. The effect of the court's decision was forever to bar petitioner from litigating these post-release rights. See discussion at pp. 16-17, *infra*.

10. So-described by SCM's officers. (Burns 568a)

11. *Per se* illegal under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Burns 563a, 1134a; Kunkel 552-553a; Rush 1080a; Hall 758a; Roberts 390a.

ing their own SCM machines outside assigned territories;[12] (3) a prohibition against independent dealers handling competitive paper;[13] (4) a policy requiring SCM service personnel and independent dealers to refuse to perform service on SCM machines under maintenance agreements or guarantees where the customer was using competitive paper in the machine;[14] and (5) a policy of refusing to sell toner[15] separate from SCM paper unless the customer (including independent dealers) was willing to pay $85 per pint,[16] whereas immediately prior to the institution of this component of the policy, SCM had sold toner for only $1.75 per pint.[17]

The overall program was designed by SCM to ensure that every copy made in an SCM photocopy machine be made on specially-treated photocopy paper purchased only from SCM,[18] even though paper sold by competitive suppliers was equal or superior to SCM paper for use in SCM machines.

On April 7, 1964, SCM discovered that VIP had violated the user and territorial restriction policies by selling SCM photocopy machines outside its assigned territory to a competitive dealer.[19]

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12. *Per se* illegal under *Schwinn*. Kunkel 544a; Rush 1080-1081a; Roberts 383a; Lett 321a, 323a.

13. PX 263-264; Kunkel 548-549a; Magruder 787-788a; Roberts 398a.

14. *Per se* illegal under *Advance Business Systems & Supply Co. v. SCM Corp., supra*, n. 1. PX 98; PX 542; PX 818; PX 754; PX 804; PX 876; PX 877; PX 1091.

15. The counterpart of ink.

16. *Per se* illegal under *Advance Business Systems & Supply Co. v. SCM Corp.*, 287 F.Supp. 143 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969). PX 367c.

17. The $85 price was set in response to reports that Bruning paper was being sold at half the price of SCM paper and that they were making competitive inroads into SCM's paper business. The price was calculated so that the cost to the customer of Bruning paper and SCM toner at $85 per pint would be the same as if the customer had purchased SCM paper and got the toner free. (PX 121; PX 165; Burns 1150-1157a)

18. Unlike Xerox photocopy machines, which employ an indirect process and can make copies on bond paper, the SCM machines can make copies only on paper coated with zinc oxide.

19. PX 438.

On April 8, 1964, VIP was terminated as an SCM dealer.[20]

B. POST-RELEASE VIOLATIONS.

Subsequent to VIP's termination and the execution of the Settlement Agreement, SCM's refusal to sell parts and machines to VIP and the difficulties of selling paper to owners of SCM machines in the face of SCM's service policies, sabotage of machines and false statements caused petitioner additional damage.[21]

C. THE RELEASE DEFENSE.

As a defense to that portion of VIP's action relating to lost sales arising from its termination, SCM asserted a Settlement Agreement which had been executed on September 15, 1964, by VIP and SCM. This Agreement followed weeks of negotiating certain differences the parties had in regard to the state of the commercial account between them following SCM's termination of VIP as an authorized SCM photocopy dealer. It recited that ". . . the parties *have had certain differences* in regard to and growing out of the termination . . . of their Office Equipment Dealer Contract" and that they ". . . desire to settle *those differences*. . . ." Later in the agreement there appeared boiler plate and form book general release language reciting the release of unknown claims.[22]

Because of the reference to the *"certain differences"* the parties had *"had"* and the recital that the parties desire "to settle *those*

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20. Lett 331a; PX 1197.

21. One SCM serviceman, for example, testified that he allowed VIP's major customer to think that the customer's copy jamming problems were being caused by VIP's line of competitive paper, although he knew that the problem was actually resulting from an SCM machine malfunction. (Porter, RA Vol. XLVI, 7-10) Another serviceman admitted that he sabotaged machines where he found competitive paper being used. (Cashwell, RA Vol. XLV, 20-21) A VIP customer testified that she was told that the use of non-SCM paper would damage the machine and that SCM would rescind its service policy if she continued to use competitive paper. (Schmidt, RA Vol. XXXIV, 686, 692)

22. The full text of the Settlement Agreement is set forth in Appendix A at pp. 3-4.

differences," the trial court found the Agreement to be ambiguous and admitted evidence regarding the true intent of the parties and the circumstances under which the Agreement was prepared and executed. The court submitted to the jury the question of whether this language was intended to apply only to unknown claims relating to the accounting disputes or whether it was intended also to foreclose relief under the federal antitrust laws. Also submitted to the jury, at the insistence of SCM, were the issues of fraud, unilateral and mutual mistake.[23]

Although the jury was not asked to return a special verdict on the release issues, it is clear that it found for VIP.[24] It returned a general verdict in favor of VIP in the amount of $195,000, which was subsequently trebled by the court.

2. The Appeal

On August 30, 1971, the Court of Appeals for the Fourth Circuit in a split decision reversed the verdict and judgment of the trial court. It decided only the release question. It did so by applying Virginia law[24a] and holding that ". . . the language of the settlement agreement, especially paragraph two, is plainly a general release without ambiguity." (App. A, 4) The court below held as a matter of law that the intent of the parties to agree to mutual general releases was clear from the face of the instrument viewed as a whole, and that resort to extrinsic facts concerning the intent of the parties, or the circumstances under which the agreement was negotiated and executed, was unnecessary.

The dissent stated that the scope and effect of the release was an issue properly submitted to the jury and concluded ". . . that the

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23. 1449-1450a.

24. The evidence was clear that at the time the agreement was signed, the only "certain differences" the parties had *"had"* were those relating to the settlement of the commercial account, including commissions, return allowances and defective merchandise. See discussion *supra,* pp. 2-3 and n. 2-7. See also dissenting opinion, App. A, 15-16.

24a. The Agreement states that it "shall be governed by Virginia law."

release was sufficiently ambiguous that a reasonable jury could construe it not to be a bar... ." (App. A, 9) Moreover, the dissent, citing *Zenith,* and Congressional policy favoring private antitrust enforcement stated: ". . . the federal policy in favor of private enforcement of the antitrust laws supports permitting the jury to consider extrinsic evidence and to construe the release narrowly." (App. A, 14)

The court below did not discuss petitioner's claims that it was injured by SCM's violations of the antitrust laws which occurred *after* the execution of the Settlement Agreement. It concluded simply that because the Settlement Agreement granted mutual general releases all matters were settled "forever" (App. A, 4) and that the verdict of the trial court be vacated and the entire complaint dismissed. Thus, the court below held *sub silentio* that the Settlement Agreement barred even those claims arising from SCM's *future* violations of the antitrust laws, contrary to the decisions of this Court and lower federal courts holding that such a release would be void as against public policy.[25]

REASONS FOR GRANTING THE WRIT

I

The Federal Policy Favoring Private Enforcement of the Antitrust Laws Would Be Furthered by a Federal Rule of Release Construction Under Which the Releasor Could Only Be Held to Release Antitrust Claims Which He Intended to Release

The federal policy encouraging the private enforcement of the antitrust laws through private attorneys general has been frequently expressed by this Court. In *Zenith Radio Corp. v. Hazltine Research, Inc.,* 401 U.S. 321 (1971), this Court recently reaffirmed this policy in holding that the effect of a release of an antitrust claim on coconspirators "shall be determined in accordance with

25. See discussion and citations *infra,* pp. 17-18.

the intentions of the parties,"[26] rather than by reference to the common law rule that a release of one joint tortfeasor is a release of all.[27]

Over the past decade this Court has encouraged private enforcement by restricting the application of legally sophisticated defenses which bore no economic or social relation to the purposes of the antitrust laws and which impeded the remedies otherwise available to victims of their violation. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court put an end to the distinction between the standards of proof required to show the fact of, as distinguished from the amount of, damage which distinction had, in the past, provided protection to antitrust defendants.[28] In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), this Court closed the *"in pari delicto"* escape hatch. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the "passing on" defense was sharply limited, as was the defense of retroactivity. In *Leh v. General Petroleum Corporation*, 382 U.S. 54 (1965) *reh.den.*, 382 U.S. 1001 (1966), and *Minnesota M. & M. Co. v. New Jersey Wood Fin. Co.*, 381 U.S. 311 (1965) the Court interpreted Sec. 5(b) of the Clayton Act (regarding the tolling of statutes of limitations) so as to preserve the actions of private antitrust plaintiffs. In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), the Court defined "combination" so as to limit severely the force of the *Colgate* "unilateral refusal to deal" doctrine. In *Perkins v. Standard Oil Co. of California*, 395

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26. 401 U.S. at , 91 S.Ct. at 810 (1971).

27. This Court also found that the common law rule (and the rule prevalent in many states) laid "a trap for unwary plaintiffs' attorneys" (*id.* at p. 816) and thus hindered the private enforcement of the antitrust laws.

28. See also, *Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969).

U.S. 642 (1969), the "remoteness" defenses were restricted. Finally, in *Zenith Radio Corp. v. Hazeltine Research, supra,* the date of the running of the statute of limitations and the effect of a release on joint tortfeasors were interpreted in a manner which preserved the claims of private antitrust plaintiffs.

The time has come for this Court to remove one of the few remaining impediments to effective private enforcement of the antitrust laws—the "general release", negotiated and executed without reference to antitrust claims. Although the amicable settlement and release of claims, including federal antitrust claims, is to be encouraged (*Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950)), this Court should require that releases of federal antitrust claims are subject to federal law and that a releasor shall only be held to release claims which he intended to release. The competing social values involved here can be realistically accommodated without doing violence to either, and it is in the arena of such conflicting social values that this Court alone can and should act. *Certainly where, as here, the factual predicate for its claim has been consciously concealed from it and counsel instructed not to specify the claims being released, a purported release should not bar a victim of antitrust violations from recourse to the courts under the federal antitrust laws.*

II

The Decision of the Court Below Decided an Important Question of Federal Law Which Is in Conflict with Both the Philosophy and Rule Announced by This Court in Zenith Radio Corp. v. Hazeltine Research Inc.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court confronted the issue of whether or not a release of an antitrust claim, not expressly reserving rights against a coconspirator, nonetheless operated to exonerate the coconspirator. In holding that "* * * the effect of the release

upon coconspirators shall be determined in accordance with the intentions of the parties" (401 U.S. at ....., 91 S.Ct. at 809-10), this Court assumed that federal law controlled the release issue and then proceeded to select, from among three possible rules, the one which was least technical and most promotive of the policies underlying the antitrust laws. This Court stated that such a rule

> "* * * is most consistent with the aims and purposes of the treble damages remedy under the antitrust laws. We must keep in mind the multistate and multiparty character of much private antitrust litigation; * * * The straightforward rule is that a party releases only those other parties whom he intends to release." (401 U.S. at ....., 91 S.Ct. at 816)

The same policy considerations—uniformity and deterrence—which accounted for the holding in *Zenith*, apply with equal force to the present case. If a party should not be held to have released *persons* he did not intend to release, he should not be held to have released *claims* which he did not intend to release, and certainly not claims of which he was not even aware. Although this Court in *Zenith* sanctioned an inquiry into the facts and circumstances surrounding and leading up to the execution of the releasing instrument in order to determine the intent of the releasor, two out of three members of the court below held that the trial court's efforts to make such an inquiry in the instant case was reversible error.

In purporting to apply Virginia law,[29] the court, although paying lip service to the compelling public policy underlying private en-

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29. Under Virginia law the decision is also incorrect but we do not burden the Court with this issue. *The Virginia cases are clear, however, that it was proper for the trial court to submit to the jury the issue of the party's intention to a release in order to determine whether or not a particular claim is embraced by it.* See, e.g., *Smith v. Hensley*, 202 Va. 700, 119 S.E.2d 332 (1961): "The evidence shows that it was not within the contemplation and intention of the parties that the notation . . . was to relieve the appellant from liability arising out of the sale to him of the Cool Roof products. For a release to be final and complete it must

forcement of the antitrust laws (App. A, 11), erred in limiting its consideration to the four corners of the Settlement Agreement and in applying an antiquated "plain meaning of words" rule of interpretation.[30] By restricting its inquiry in this manner, the court arrived at a "clear meaning" of the Agreement which directly contradicts the meaning arrived at by the trial court and the jury who heard the evidence and observed those who gave it.[31]

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have been so intended by the parties. The evidence presented a factual situation for determination by the jury. [citation]" (119 S.E.2d at 335); *Mercury Ins. Co. v. Griffith*, 178 Va. 9, 16 S.E.2d 312 (1941): "The acceptance of a check on which appears 'in full of account,' or words of like import, does not in fact close the account unless is [sic] was accepted with intelligent appreciation of its possible consequences, coupled with knowledge of relevant facts. To be final it must have been so intended." (16 S.E.2d at 316); and *Atlantic Greyhound Lines, Inc. of West Virginia v. Metz*, 70 F.2d 166 (4th Cir. 1934) (apparently applying Virginia law): "The doctrine is firmly rooted in equity that when an instrument is so general in its terms as to release the rights of a party of which he was ignorant, and which were not in contemplation of the bargain at the time it was made, the instrument will be restrained to the purposes of the bargain, and the release confined to the right intended to be released [citations]." (70 F.2d at 168-169)

30. As observed by Chief Justice Traynor in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage and R. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968): "If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, * * *.' [citations] The meaning of particular words or groups of words varies with the '* * * verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). * * * a word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, The Interpretation of Words and the Parol Evidence Rule (1965) 50 Cornell L.Q. 161, 187.) Accordingly, the meaning of a writing '* * * can only be found by interpretation in light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.' [citations omitted]" (69 Cal.Rptr. at 564-565)

31. 1278a; 1487-1488a; RA Vol. XXXIX, 4-5, 8-9, 15.

III

Confusion Exists in the Circuit and District Court Cases Regarding Both the Interpretation of Releases of Federal Antitrust Claims and the Applicability of the Parol Evidence Rule

The lower court's decision also raises an important federal question, never before squarely decided, which this Court ought to settle in order to eliminate confusion surrounding the construction of releases of antitrust claims and, therefore, private enforcement of the antitrust laws.

Broadly stated, the issue is whether a single, uniform federal rule should control the construction and interpretation of a purported release of a federal antitrust claim or whether the release of a federally-created cause of action is to be measured by the release rules of 50 separate state jurisdictions. Subsidiary questions are (a) whether the vagaries of the states' varying versions of the parol evidence rule and the myriad exceptions thereto are to be declared an integral part of federal antitrust jurisprudence, and (b) even assuming there is to be no single, uniform federal rule, whether state rules must not be applied in such a way as to comport with the strong private enforcement and deterrent policy underlying the antitrust laws.

Although petitioner has found no other Court of Appeals decision deciding the precise question, it is clear that the decisions of the circuit and district courts concerning releases of federal antitrust claims are varying and confusing; if not actually conflicting.[32] Some cases expressly apply state law without reference to federal law or policy; others do so implicitly. Others apply state law with a view to compliance with federal policy. Still others apply a federal rule. Many cases simply decide questions regarding

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32. See Appendix C for a collection of cases reflecting the various approaches. Although many of the cases cited in Appendix C deal with the effect of the release of a joint tortfeasor and, in view of the *Zenith* decision, no longer present a conflict, the varying approaches to the question of applicable law reflected in those cases typify the confusion that surrounds other issues involving the release of antitrust claims.

releases of antitrust claims without any discussion of the law being applied.

While both the issue involved in and the policy considerations giving rise to the decision in the *Zenith* case are parallel to those in the present case, this Court, in order to eliminate any uncertainty, ought to settle the question of what law should apply and set forth a uniform rule of construction for releases claimed to encompass federal antitrust claims.

On other occasions, this Court has held that a release of a federally created statutory claim raises pervasive federal questions which are to be determined by federal rather than state law. See, e.g., *Dice v. Akron, Canton and Youngstown R. Co.*, 342 U.S. 359 (1952), holding that the validity of a release of a claim under the Federal Employers Liability Act raises federal questions to be determined by federal rather than state law; and *Aro Manufacturing Co. v. Convertible Top Placement Co.*, 377 U.S. 476 (1964), where this Court apparently formulated a uniform federal rule holding, in a patent infringement case, that a contributory infringer was not within the ambit of an earlier release given to other infringers. See also the recent Fifth Circuit decision in *Cates v. United States*, 40 Law Week 2193 (1971), holding that in a case involving a federal non-statutory cause of action (an admiralty claim) this Court's decision in *Zenith* required rejection of the common law rules dealing with releases and held, as in *Zenith*, that the intent of the parties is the sole criterion for determining the scope of a release.

The need for a uniform federal rule with reference to releases of antitrust claims is pointed up by the various approaches found in the lower federal courts. Although many of them in philosophy or rationale support petitioner's position,[33] the impact of the

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33. See, e.g., *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948); *Walder v. Paramount Publix Corp.*, 132 F.Supp. 912 (S.D.N.Y. 1955); and *Novak v. General Electric Corp.*, 282 F.Supp. 1010 (E.D.Pa. 1967), all of which were discussed in the dissenting opinion below, Appendix A.

various states' interpretation and application of the parole evidence rule makes predictability impossible. Moreover, the vagaries of the various states' interpretation of the parol evidence rule lay "trap[s] for unwary plaintiffs' attorneys",[34] contrary to the policy expressed by this Court in *Zenith*.

Even if this Court were to determine that a single uniform rule free of state evidentiary variations is not appropriate, at the very least this Court should hold that if state law is to apply, that law, including the local version of the parol evidence rule, should comport with, advance and not be inconsistent with the policy of the underlying federal statutes creating the antitrust cause of action. This view finds support in *Novak v. General Electric Corp.*, 282 F.Supp. 1010 (E.D.Pa. 1967),[35] which, curiously, is cited by both the majority and the dissent below.[36] Similarly, even if the effect of state law is unclear,[37] an interpretation should be chosen which is not inimical to the federal policy favoring private enforce-

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34. *Zenith Radio Corp. v. Hazeltine Research Inc.*, *supra.*, 401 U.S. at ....., 91 S.Ct. at 810; and, *a fortiori*, lay traps for unwary plaintiffs, not represented by counsel, as was the case with petitioner prior to and when executing the release.

35. In *Novak* the court stated that before an unknown antitrust claim may be validly released it is necessary at the very least for "* * * the court to determine that they *knew and intended* that the release cover all that it is being held to cover . . ." (282 F.Supp. at 1023), implying, of course, that extrinsic evidence should be received on the question of intent.

36. The dissenting judge, in addition to concluding that the release issue was properly a jury question, would have applied a rule similar to that set forth in *Novak:* "But even if state law is not wholly displaced, federal policy has some bearing on the question. If the state law governing releases were antagonistic to the effective enforcement of private antitrust claims, for example, the interposition of a federal rule might be appropriate. See *United States v. Yazell*, 382 U.S. 341, 352 (1966) (state interests 'should be overriden by the federal court only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.')" (App. A, 13)

37. See dissenting opinion. (App. A, 9-10)

ment of the antitrust laws, which permits the jury to consider extrinsic evidence and to construe the release narrowly. Such a rule would protect an unsophisticated victim of antitrust violations from releasing antitrust claims of which he was not aware, and would certainly protect one in petitioner's position, from whom the factual predicate for an antitrust claim had been concealed.

IV

The Order of the Court Below Violated Public Policy and the Admitted Interpretation of Both Parties by Dismissing Claims for Future Post-Release Antitrust Violations

An agreement releasing future antitrust violations is void as against public policy.[38] In ordering the complaint dismissed, including VIP's claims for damages arising out of post-release antitrust violations, the decision of the court below is in conflict with that policy and with the decisions of this Court.

Although the decision below is silent on the issue of VIP's claims arising from post-release antitrust violations, its effect is forever to bar petitioner from a recovery on such claims, notwithstanding that SCM's own pleading,[39] the pretrial statements of the parties, the concession of SCM's counsel at trial,[40] the

38. *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 39 F.Supp. 117 (S.D.N.Y. 1941), *aff'd.*, 136 F.2d 844 (2d Cir. 1943); and *Fox Midwest Theatres v. Means*, 221 F.2d 173 (8th Cir. 1955), where the Court held: "Any contractual provision which could be argued to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy. * * * Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade'. Section 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. Section 1, of course, brands all contracts in restraint of trade as 'illegal'." 221 F.2d at 180.

39. SCM's answer which sets forth the release as a defense conceded that it applied only to that portion of the complaint which "relates to activities occurring prior to September 15, 1964," the date of the release.

40. 489a.

jury instructions and all briefs recognized that the release, even if it covered the termination aspect of the case, would not completely bar petitioner's claims. The absence of any mention of these claims suggests an oversight on the part of the court below which it refused to correct, although its error was pointed out in the Petition for Rehearing.

The complaint alleged and the evidence showed that the illegal practices of SCM were commenced prior to the termination of petitioner as an SCM dealer—and that they continued thereafter. The impact on petitioner of these continuing acts changed after its termination: whereas VIP had initially been affected by SCM's practice when it was terminated and suffered damage incident to the termination (proven at the trial through projections of income VIP would have made had it not been terminated[41]), it found itself, *after* termination, in competition with SCM just as was plaintiff in *Advance Business Systems and Supply Co. v. SCM Corp., supra.* Petitioner's post-termination damages were similar to the damages suffered by the plaintiff in that case. Therefore, even if the release covered the claims arising out of the unlawful termination, VIP would have been relegated to, but not deprived of, the second impact of SCM's post-release antitrust violations.

Because of the strong "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble damage action"[42] this Court should grant the petitioner's petition on the additional ground that the effect accorded to the release by the court below is against public policy.

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41. Maddrea 890-895a; Mitchell 996a, 998-999a.

42. *Lawlor v. National Screen Service Corporation, supra,* 349 U.S. at 329.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the decision below.

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Appendix A

United States Court of Appeals
For the Fourth Circuit

No. 15,041 & 15,042

Virginia Impression Products Co., Inc.

Appellant,

versus

SCM Corporation,

Appellee.

On Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued March 3, 1971 Decided August 30, 1971.)

Before BRYAN, WINTER, and CRAVEN, Circuit Judges.

John S. Battle, Jr., and Stephen R. Kaye (Richard L. Williams, and McGuire, Woods and Battle; and Ronald S. Rauchberg and Allen P. Rosiny, and Proskauer, Rose, Goetz and Mendelsohn, and Jerry Oppenheim on brief) for Appellant in No. 15,042 and Appellee in No. 15,041; and John S. Martel (Thomas Elke, and Jerome I. Braun, and Farella, Braun and Martel; and Andrew J. Ellis, Jr., and Mays, Valentine, Davenport and Moore on brief) for Appellant in No. 15,041 and Appellee in No. 15,042.

CRAVEN, Circuit Judge

After SCM Corporation cancelled its dealership agreement with Virginia Impression Products Co. (VIP), this suit for treble damages was brought by VIP alleging that territorial and customer restrictions imposed by SCM violated the antitrust laws.[1] SCM

posed a general settlement agreement between the parties as a defense, urging that it effectively released antitrust claims as well as all others, and that VIP was barred from bringing the present action. We agree.

Between September 1962 and April 1964, VIP operated as an exclusive dealer for SCM photocopy equipment in the Richmond, Virginia, area. At the same time VIP maintained exclusive dealership arrangements with at least thirteen manufacturers of other types of office equipment. As part of its sales program, SCM gave dealers like VIP exclusive territorial sales privileges for SCM photocopy products, but these dealers were prohibited from selling to customers outside the prescribed territory or to customers who were not "users." The latter provision was an attempt to keep SCM equipment out of the hands of unauthorized dealers who did not sell SCM photocopy paper. However, two machines originally delivered to VIP were found in the hands of an unauthorized non-user outside VIP's sales area. SCM, believing that VIP had violated its customer and territorial restrictions, cancelled the dealership agreement. In the present action, VIP claims that SCM's sales restrictions violated the antitrust laws and that it was damaged as a result of SCM's unlawful activity.

After the cancellation of the dealership agreement, Mr. Sexton of SCM's legal department engaged a member of a Richmond law firm, Mr. George G. Freeman, Jr., to negotiate a settlement agreement. Sexton informed Freeman that he wanted a general release from VIP to insure that SCM would not later be confronted with an antitrust suit. After preliminary negotiations between VIP and SCM over financial differences were completed, Freeman drafted a proposed agreement and sent copies to Mr. Redman, president of VIP. The proposed settlement agreement contained the results of the financial negotiations and additionally contained mutual general releases. The entire agreement is set out in the

1. *See,* United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967).

margin.[2] Paragraph two of the agreement purported to release SCM "from any claim, demand, cause of action, and liability of every kind or character, known and unknown" arising from the cancellation of the dealership agreement. Redman, without consulting an attorney and without seeking clarification of the terms of the agreement from anyone at SCM, signed the settlement agreement as it had been submitted to him.

In 1968 the instant action was begun by VIP. SCM set up the release given in the settlement agreement as a defense. The district court, however, found the terms of the release ambiguous, and submitted the question of the intent of the parties to the jury along with questions of mutual mistake and fraud. This appeal was taken from a general verdict in favor of VIP.

2.

SETTLEMENT AGREEMENT

Whereas, SCM Corporation, a New York corporation with its principal office in New York, N. Y. (SCM), and Virginia Impression Products Company, Incorporated, a Virginia corporation with its principal office in Richmond, Virginia (Impression Products), have had certain differences in regard to and growing out of the termination on April 8, 1964, of their Office Equipment Dealer Contract, dated December 10, 1963 (the Equipment Agreement), and the parties now desire to settle those differences.

NOW, THEREPORE, SCM and Impression Products agree as follows:

1. Impression Products hereby delivers to SCM checks made payable to the order of SCM, one in the amount of $9,157.39 and dated July 31, 1964, and one in the amount of $2,000 and dated August 27, 1964. Impression Products also delivers to SCM 7 notes of Impression Products, Number 2 through 8, each dated July 27, 1964, and in the amount of $2,000, but each payable on the date indicated below:

No. 2	September 27, 1964
No. 3	October 27, 1964
No. 4	November 27, 1964
No. 5	December 27, 1964
No. 6	January 27, 1965
No. 7	February 27, 1965
No. 8	March 27, 1965

2. Impression Products hereby releases, quit-claims and discharges SCM, its successors and assigns from any claim, demand, cause of action, and liability of every kind or character, known and unknown, now existing or which may hereafter arise from the

We think the language of the settlement agreement, especially paragraph two, is plainly a general release without ambiguity. It could hardly be plainer. The district court found an ambiguity in the "WHEREAS" clause which stated that the parties "have had certain differences" arising from the dealership termination, and that they "now desire to settle those differences." The Court below read the clause as limiting the scope of the agreement to "those differences" and reasoned that if it could not be determined from the face of the document what "those differences" were, the intent of the parties presented a factual issue for the jury.

If the agreement purported to be a special release, and not a general one, such a construction might be appropriate. But the very nature of a general release is that the parties desire to settle all matters forever. A general release such as we have here not only settles enumerated specific differences, but claims "of every

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Equipment Agreement, or its cancellation, including, without limitation, the cancellation of all outstanding purchase orders, which orders Impression Products hereby withdraws.

3. SCM hereby releases, quit claims and discharges Impression Products, its successors and assigns, from any claim (including without limitation all claims for amounts due on material delivered by SCM to Impression Products), demands, cause of action, and liability of every kind of character, known and unknown, now existing or which may hereafter arise from the Equipment Agreement, or its cancellation, except as provided in Section 4 below.

4. This settlement is based on the assumption that Impression Products will pay promptly at maturity each of its notes delivered to SCM pursuant to Section 1 above and for that reason Impression Products has been given by SCM a $5,022 credit on its purchases, which represents credit of the 7% discount usually allowed only for 10-day payment; accordingly, if Impression Products defaults in the prompt payment at maturity of any such note, Impression Products shall immediately forfeit the $5,022 credit and such amount shall immediately become due and payable hereunder to SCM by Impression Products.

5. This Agreement shall be governed by Virginia law.

IN WITNESS WHEREOF, each of the parties has caused these presents to be signed in its name and on its behalf by its President or Vice President, attested by its Secretary or an Assistant Secretary, both being thereto duly authorized, [sic] all as of the 15th day of September, 1964.

kind or character, known and unknown." Compare *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, (S.D.N.Y. 1955).

A release is just another contract in which the intent of the parties is to be derived from the face of the instrument viewed as a whole. See *Warrie v. Boze*, 191 Va. 916, 62 S.E.2d 876, 880 (1951). Viewing the settlement agreement as a whole, the intent of the parties to agree to mutual general releases is clear. It is significant, we think, that the release agreement recites that the specific "differences" are "in regard to and growing out of" termination of the very dealership agreement now said to have been unlawful and in violation of the antitrust laws. It is true Paragraph one sets out the terms of the agreement on accounts. Had the parties intended to limit their agreement to financial matters there recited they could have stopped there. Instead they went further. The broad language of a general release was included in the context of settling termination of the very Equipment Dealer agreement which is now the basis for claimed antitrust law violations. In such a context we must give effect to the plain meaning of words. *W. F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc.*, 203 Va. 259, 123 S.E.2d 377, 380-81 (1962); *William Schluderberg-T. J. Kurdle Co. v. Trice*, 198 Va. 85, 92 S.E.2d 374, 377 (1956). See also, *Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.*, 311 F.2d 389, 394 (4th Cir. 1962).

We think there was no jury issue as to mutual mistake, fraud, or misrepresentation. It was clearly established at the trial that Mr. Sexton of SCM's legal department clearly desired a general release, and communicated that desire to Freeman in Richmond. There is no evidence that he ever desired anything less. For a mutual mistake to vitiate the effect of this release, both parties must have intended not to include a general release in the settlement agreement. *Marshall v. Cundiff*, ____ Va. ____, 180 S.E.2d 229, 232 (1971). Unilateral mistake is not enough. See *DeHart v. Richfield Oil Corp.*, 395 F.2d 345, 348 (9th Cir. 1968).

Nor can we discern any evidence whatsoever of fraud or misrepresentation of a material fact. VIP points to Sexton's desire, which was not expressed to Redman, that a general release be obtained to avoid possible antitrust litigation. The law imposes no obligation on a party to a general release, dealing at arms length, to reveal all the possible legal theories that the other may possibly use against him. The law merely requires one to reveal material facts if they are unknown to the others. *Clay v. Butler*, 132 Va. 464, 112 S.E. 697, 700 (1922). Redman was not "acting under a mistake as to undisclosed material facts," Restatement of Contracts § 472(1)(b) (1932), when he signed the agreement because he knew as well as Sexton all the material facts.[3] At most he simply failed to appreciate their significance, and failed to consult a lawyer, a dereliction not chargeable to SCM. He was not misled and indeed was encouraged by Mr. Freeman to consult his lawyer before signing the agreement.[4] Neither VIP's failure to appreciate

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3. Significantly SCM never concealed its reason for dealership termination or pretended a fictitious one. Presumably VIP could as well have concluded at the time of signing the settlement agreement as subsequently that it was terminated "because it had sold machines to a non-user in violation of its territorial agreement and to a competitive paper seller . . ." Brief for Appellee at 16.

4. Freeman encouraged Redman to seek legal advice when he submitted the proposed settlement agreement for his consideration.

September 11, 1964

Dear Mr. Redman:

In accordance with our recent conversations regarding settlement of your controversy with SCM Corporation, I enclose 4 copies of the Settlement Agreement. *After you have reviewed it with your counsel, as you have indicated you would like to do, if he has any questions, I would be delighted to consult with him.* If you find the Agreement in order, would you please execute two copies and return them to me. I will then forward them promptly to SCM Corporation for execution and upon their return to me we could effect the settlement here in our office.

* * * *

If I could receive your comments or the Agreement on Tuesday or Wednesday of next week we would be able to have the final settlement during the week of the 21st.

Sincerely yours,

George G. Freeman, Jr.

(emphasis added)

the significance of the known facts, nor Redman's lack of expertise in the antitrust laws is sufficient to excuse VIP's compliance with the terms of the release. See, *Corbett v. Bonney*, 202 Va. 933, 121 S.E.2d 476, 481 (1961).

Since there were no questions of fact to be submitted to the jury, the construction of the contract was for the court. Its meaning is clear, and we find no prohibition in the statutes or in the policy behind the antitrust laws that prohibits the disclaimer of antitrust claims by a general release. Although private enforcement is a hallmark of the antitrust laws, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 336 (1971), it is not mandatory and federal policy does not prohibit agreements among private individuals releasing such claims.

> While the federal policy of jealously regarding the rights of private antitrust claimants should not as a matter of law preclude their being able to release claims—*even unknown claims*—nor protect them, after-the-fact, from their conscious though unwise action, we think it does allow—and is supported by—a rule which requires the court to determine that they *knew and intended* that the release cover all that it is being held to cover.

Novak v. General Electric Corp., 282 F. Supp. 1010, 1023 (E.D. Pa. 1967) (first emphasis added).[5]

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5. In *Novak*, Judge Higginbotham noted that
> Mere shorthand references such as "general release" are not in themselves sufficient. Nor do I think that ritualistic incantations . . . are sufficient to deprive one of unknown antitrust claims. It is not too much to require the conspicuous insertion of a phrase stating that the release covers, for example, "all claims, whether presently known, or unknown, suspected or unsuspected, arising out of the same or of different product lines as are here involved and whether related or unrelated to the present dispute as to law or facts or both," before we hold that *as a matter of law*, the parties *must* have intended to cover a prior unknown and unrelated claim.

Novak v. General Electric Corp., 282 F. Supp. 1010, 1023 n. 44 (E.D. Pa. 1967). *See also*, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U. S. 321, 342-43 n. 10 (1971). Compare the language in paragraph 2

Because we conclude that, as a matter of law, the settlement agreement expresses the intent of the parties to grant mutual general releases, the verdict rendered below will be vacated, and the complaint dismissed.

Reversed.

WINTER, Circuit Judge, dissenting:

Because I cannot conclude that, as a matter of law, the Settlement Agreement (release) executed by VIP barred the antitrust cause of action it sought to assert against SCM, I must respectfully dissent. In my view, the Court should conclude that whether the release constituted a bar was an issue properly submitted to the jury and should proceed to decide the myriad other issues that the appeals present.

My brother Craven has set forth the terms of the release. It recited that "[w]hereas" the parties have had "certain differences in regard to and growing out of the termination . . . of their Office Equipment Dealer Contract" and that they "desire to settle *those* differences," (emphasis added) and, "[t]herefore," VIP released SCM "from any claim, demand, cause of action, and liability of every kind or character, known and unknown, now existing or which may hereafter arise from the Equipment Agreement, or its cancellation. . . ." The form of the agreement is that of a syllogism but its conclusion is a *non sequitur* because, manifestly, parties do not release and settle *certain* designated differences by releasing and settling *unknown* claims "now existing or which may *hereafter arise*."[1] Both from the language

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of the VIP-SCM settlement agreement, *supra* note 2, which is equally explicit under the facts before us. Such a requirement, as Judge Higginbotham would impose on the release of antitrust claims, appears consistent with Virginia's construction of general releases. *See,* Smith v. Hensley, 202 Va. 700, 119 S.E.2d 332, 334 (1961).

1. My conclusion would readily be to the contrary if the parties had recited in the whereas clause that they desired to settle certain differences between them as well as "any other differences of like or different nature, known or unknown, now existing or which may hereafter arise," or words of like import.

employed and applicable authorities, I conclude that there was an ambiguity on the face of the instrument. Under the law of Virginia, the jurisdiction in which the document was executed and delivered and to which it relates, an ambiguity renders the question of whether the release should be given the effect of releasing SCM from the latter's substantial antitrust violations one for the jury after an evidentiary exploration of what the parties intended and after proper instructions from the court.[2] *Greater Richmond Civic Recreation, Inc. v. A. H. Ewing's Sons,* 200 Va. 593, 106 S.E. 2d 595 (1959); *Geoghegan Sons & Co. v. Arbuckle Bros.,* 139 Va. 92, 123 S.E. 387, 389 (1924) (dictum).

My conclusion that the release was sufficiently ambiguous that a reasonable jury could construe it not to be a bar here is supported by the widely-accepted commonlaw principle that general releases are to be construed narrowly. Williston states that "[a] release, although general in terms, will be reformed so as to cover merely the right with regard to which the parties were dealing and exclude rights of which they were ignorant." 13 *Contracts* § 1551 at 188-89 (3rd ed. 1970). Virginia probably would not go as far as Williston in this direction, see *Marshall v. Cundiff,* ..... Va. ....., 180 S.E.2d 229 (1971), in which a release which unambiguously and emphatically covered known and unknown injuries without listing specific ones, was held effective to bar subsequently discovered injuries. But in dealing with less clear and sweeping releases, Virginia has allowed its

2. I hasten to add that I do not undertake to decide the antitrust issues in these appeals. Neither the majority nor I reaches them in view of the majority's decision with respect to the efficacy of the release. I refer only to the related case of *Advance Business System & Supply Co. v. SCM Corp.,* 415 F.2d 55 (4 Cir. 1969), in which SCM's methods of doing business in Maryland, which were similar to the methods pursued in Virginia, were found to be in substantial violation of the antitrust laws.

juries considerable leeway in adopting narrow constructions. See *e.g., Smith v. Hensley,* 202 Va. 700, 119 S.E.2d 332 (1961).[3] There, Hensley was a franchised dealer in Smith's "Cool Roof" roofing products. Hensley went out of business at a time when he was indebted to Smith for materials purchased. As part of the settlement of the debt, Hensley gave Smith a check on which it was noted that it was "[i]n full settlement, notes, secured by deed of trust, Cool roof matters, and all other differences." At a later date, apparently Hensley was successfully sued by users of defendant's products which had discolored and cracked. Hensley then sued to obtain reimbursement from Smith, and Smith pleaded the notation on the check as a release of the cause of action sought to be asserted. The court rejected this defense, saying:

> . . . There is no merit in the appellants' contention that the notation on the $1,000 check barred the appellee's right as a matter of law to bring this suit. The undisputed evidence shows that the check was given to the appellants pursuant to an agreement between the parties to settle the appellee's indebtedness, and that the notation made on the check was for the purpose of relieving him of the duty to adjust future complaints arising out of the sale and application of the Stay Cool products. The settlement agreement brought to an end the dealership arrangement between the parties and all materials and equipment on hand were returned to the appellant. The evidence shows that it was not within the contemplation and intention of the parties that the notation on the check was to relieve the appellant from liability arising out of the sale to him of the Cool Roof products. For a release to be final and complete it must have been so intended by the parties. The evidence presented a factual situation for determination by the jury.

3. Resort to Virginia law at least impliedly suggests that it determines resolution of the issue of the effect to be given to the release. Although Virginia law is obviously important there are federal considerations arising out of the fact that a federal cause of action, i.e., violation of the federal antitrust laws is sought to be asserted. This point will be more fully developed in the text, *infra.*

119 S.E.2d at 335. See also, *Mercury Ins. Co. v. Griffith,* 178 Va. 9, 20, 16 S.E.2d 312, 316 (1941).

Similar cases from other jurisdictions include *Vines v. General Outdoor Advertising Co.,* 171 F.2d 487 (2 Cir. 1948), and *Walder v. Paramount Publix Corp.,* 132 F.S. 912 (S.D.N.Y. 1955). In *Vines,* a salesman of outdoor advertising sued his former employer for compensation for services rendered by him. His employment contract provided that he would be paid on a commission basis. The contract also provided that the assignment of accounts to him for solicitation might be withdrawn by the employer at any time prior to an actual sale, in which event his right to compensation for work on the withdrawn accounts would cease. The plaintiff claimed, however, that the withdrawal of one of his accounts, that of Liebmann Breweries, was pursuant to a contract between his employer and Outdoor Advertising Company, Inc., which had been declared to be in violation of the antitrust laws. Plaintiff further alleged that he did not know of these facts until after his suit for compensation had been instituted. He claimed damages under the antitrust laws.

As a defense, the defendant pleaded a written release of "all claims and demands of any kind whatsoever to the date hereof, and particularly . . . any claims or demands for salary, commissions or other compensation under any employment or contract of employment. . . ." The district court dismissed the complaint, but the Second Circuit (per Learned Hand, J.) reversed, saying:

> Although the plaintiff says that on April 8th, 1941, he did not know that the transfer of the Liebmann Breweries had been made in pursuance of an illegal contract between the defendant and Outdoor Advertising Co., Inc., that ignorance might not alone be enough to avoid the release, had it contained only the general words. Moreover, the fact that words of general import were followed by particular instances, did not inexorably leave no scope to the words of general import. In releases, as elsewhere, the intent of the

> parties is to be gathered from the instrument as a whole. Nevertheless, the courts of New York accept the common law doctrine that in a release words of general import, followed or preceded by words relating to specific claims are, ceteris paribus, limited to the specific claims. For the present, we need say no more than that the release of April 8th, 1941, did not inevitably release claims which the plaintiff might have under the Anti-Trust Acts, of which he was ignorant at the time. (footnotes eliminated.)

171 F.2d at 492.

In *Walder*, a case strikingly similar to the one before us, the former owners of a motion picture theater sued a motion picture distributor for treble damages and an injunction under the anti-trust laws; and the distributor asserted as a defense a release governed by Florida law. The court held the release legally insufficient to support summary judgment for the distributor. The essential terms of the release and the court's holding appear from the following:

> There are general clauses in the release sufficiently broad to bar the plaintiffs' present claims. However, the first "whereas" clause suggests a narrower scope. It states that the parties have had dealings and transactions relating to the "Tivoli Theatre and its equipment" and that disputes have arisen "with reference thereto and otherwise." The defendants, in addition to the general clauses rely on the words "and otherwise", but the "whereas" clause read as a whole appears to imply a more limited scope than that for which they contend. Whether the release was limited to the claims relating to equipment and repairs or was sufficiently broad to encompass all claims arising out of the operation of the theatre including antitrust violations, is not altogether clear from the face of the document. In view of this ambiguity the intention of the parties becomes relevant. Thus a substantial issue of fact exists which requires the denial of the motion for summary judgment. (footnotes eliminated.)

132 F.S. 916-917. See also, *Clarke Bariden, Inc. v. Merrit-Chapman & Scott Corp.*, 311 F.2d 389, 394 (4 Cir. 1962) (dictum).

There is another reason to treat the release as ambiguous and to allow the jury to consider extrinsic evidence of its scope. The antitrust cause of action that VIP has sought to assert is a creation of federal law. It is Congressional policy to rely heavily upon the private attorney general concept for enforcement of the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 336 (1971); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-318 (1965). There is some authority indicating that in view of this federal policy, federal law should wholly displace state law governing release of antitrust claims. In *Zenith, supra,* the Court assumed that the question of whether the release of one antitrust defendant released his coconspirators was a matter to be determined without reference to a particular state's rules on releases. See also, *Dice v. Akron, Canton & Youngstown RR Co.*, 342 U.S. 359 (1952) (federal law held to govern releases of claims under the F.E.L.A.). However, none of the authorities holds that federal law must be applied to govern the applicability of an antitrust release to the parties to the release where, as here, the parties contracted with reference to state law. But even if state law is not wholly displaced, federal policy has some bearing on the question. If the state law governing releases were antagnostic to the effective enforcement of private antitrust claims, for example, the interposition of a federal rule might be appropriate. See *United States v. Yazell*, 382 U.S. 341, 352 (1966) (state interests "should be overriden by the federal court only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."); *Novak v. General Electric Corp.*, 282 F.S. 1010 (E.D.Pa. 1967) (dictum). Similarly, where, as here, the effect of state law is subject to some dispute, an

interpretation of state law should be chosen which is not inimical to federal policy. Here, the federal policy in favor of private enforcement of the antitrust laws supports permitting the jury to consider extrinsic evidence and to construe the release narrowly. See, *e.g.*, Judge Higginbotham's highly persuasive opinion in *Novak, supra:*

> While the federal policy of jealously regarding the rights of private antitrust claimants should not as a matter of law preclude their being able to release claims—even unknown claims—nor protect them, after-the-fact, from their conscious though unwise action, we think it does allow—and is supported by—a rule which requires the court to determine that they *knew and intended* that the release cover all that it is being held to cover.[44] The question of the parties' intent as to the scope of the release is one of fact not readily ascertained on a motion for summary judgment; but which should be determined by the trier of fact after a full hearing. (emphasis in original.)

282 F.S. at p. 1023.[4]

Vines and *Walder, supra,* are additional support for *Novak* because, although federal policy was not an articulated basis of decision, in each of these two cases, the court looked behind broad language of release to hold that an antitrust claim was not released as a matter of law.

If I am correct that the jury was correctly permitted to consider the evidence of the intention of the parties, there is an ample

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4. It should be noted that the quoted extract contains footnote 44, the text of which is set forth as footnote 5 in the majority opinion in the instant case. While the majority apparently deems the language of the release in the instant case as equally explicit as that which Judge Higginbotham indicated he would permit to operate according to its terms, I submit that it is not. In the instant case, the ambiguity arises because of the recitation of intention to settle certain designated differences followed by undesignated unknown and future claims. This inconsistency was conspicuously absent in Judge Higginbotham's case, and hence I cannot read Judge Higginbotham to indicate that he would enforce literally the operative releasing language of the release in this case so as to preclude assertion of the antitrust claim.

record from which the jury could conclude that there was no mutual intention to release VIP's alleged antitrust claim.[5] Unilateral mistake may be insufficient to avoid a contract where the language in the contract is unambiguous; but where the contract language is not clear, the absence of mutual agreement simply results in the conclusion that there was no contract. 3 Corbin on *Contracts* § 538, at 64-65 (1960). Moreover, the record provides an adequate explanation of what the parties mutually intended to release when they agreed to release unknown claims now existing or which may hereafter arise, so that a jury could give effect to all of the language of the release without concluding that it constituted a release of the antitrust claim or without rendering it meaningless.

Briefly stated, the record shows this: SCM intended to obtain a release of its antitrust liability. VIP did not know, and did not realize until well after the release was executed, that SCM's motive for terminating the dealership contract was its desire to enforce territorial restrictions. Hence, it could well be concluded that VIP had no intention of releasing its antitrust claim because it was not aware that it had the claim at the time that it executed the release.

On the other hand, VIP did intend to release some unknown claims. Under the equipment dealer contract, VIP was entitled to a commission on the sale of every SCM machine to be *used* in its territory, although purchased elsewhere, and, conversely, it was obliged to split commissions on SCM's machines which it sold but which were intended to be used outside of its territory. More importantly, it was obliged to honor warranties on all SCM machines *used* in its territory and not just those which it sold. Thus, at the time of settlement there may well have been unknown claims for commissions or under warranties, or even for parts sold

5. I leave aside SCM's contention that the jury was not fairly or properly charged on this issue.

or repair work performed, presently in existence or thereafter to arise. These, it seems to me, are what were intended to be given up and not the antitrust claim, unknown to VIP, which SCM feared, but artfully refrained from making explicit when its counsel drafted the release.

Appendix B

United States Court of Appeals
For the Fourth Circuit

No. 15,041

Virginia Impression
Products Co., Inc.,

Appellant,

versus

SCM Corporation,

Appellee.

No. 15,042

Virginia Impression
Products Co., Inc.,

Appellee,

versus

SCM Corporation,

Appellant.

ORDER

The petition for rehearing is denied. The suggestion for rehearing en banc is rejected, no judge having requested the court be polled. Judge Winter adheres to his dissenting viewpoint.

s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge

Filed Oct 18 1971
Samuel W. Phillips, Clerk

Appendix C

1. *Cases Applying State Law:*

Eagle Lion Films v. Loew's, Inc., 219 F.2d 196 (2d Cir. 1955) (applying New York law to agreement stating it was to be governed by New York law on question of whether release of one joint tort feasor is release of all); *Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950) (assuming California law to be applicable to question of whether unknown antitrust claims are included within general release); *The Southern New England Distributing Corp. v. Admiral Corp.*, 1965 Trade Reg. Rep., ¶ 71,471 (D. Conn. 1965) (applying Illinois law in accordance with provision of agreement in determining the scope of the agreement); *Solar Electric Corp. v. General Electric Co.*, 156 F. Supp. 51, (W.D. Pa. 1957) (expressly applying Pennsylvania law to question of whether release of one joint tort feasor is release of all); *Walder v. Paramount Publix Corp.*, 132 F.Supp. 912 (S.D.N.Y. 1955) (apparently applying Florida law to determine scope of release); *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (2d Cir. 1948) (applying New York law to construe release containing general language followed by specific language as "not inevitably releas(ing) claims which the plaintiff might have under the Anti-trust Acts, of which he was ignorant at the time.").

2. *Cases Applying Federal Law:*

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795 (1971); *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 402 F.2d 83 (5th Cir. 1968) (following *Winchester* and applying federal law to question of whether release of one joint tortfeasor is release of all); *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theater,*

351 F.2d 925 (9th Cir. 1965) (holding that federal law applies to question of whether the release of one co-conspirator which did not expressly reserve rights against other co-conspirators releases all co-conspirators); *Mustang Oil Co., Inc. v. Crown Central Petroleum Co.*, 1971 Trade Reg. Rep. ¶ 73,657 (W.D.N.C. 1971) (following *Zenith* and applying federal law to question of whether release of one co-conspirator is release of all); *Green v. Aerosol Research Company*, 286 F.Supp. 627 (N.D. Ill. 1968) (apparently applying federal law in determining scope of release agreement); *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 198 F.Supp. 638 (S.D.N.Y. 1961) (applies federal law to question of whether a document was a covenant-not-to sue or a release); *Taxin v. Food Fair Stores, Inc.* 197 F.Supp. 827 (E.D.Pa. 1961) (holding that federal law supersedes state law on question of whether releasing party must tender consideration received as a prerequisite to action to avoid the release on grounds of fraud); *Taxin v. Food Fair Stores, Inc.*, 181 F.Supp. 181 (E.D.Pa., 1960) (apparently applying federal law to question of whether release was fraudulently obtained).

3. *Cases Not Specifying the Applicable Law:*

Fabert Motors, Inc. v. Ford Motor Co., 365 F.2d 888 (7th Cir. 1966) (unclear what law was applied in determining scope of release); *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F.2d 5 (3rd Cir. 1957) (declining to decide whether federal, New Jersey or common law applies to question of whether release of joint tortfeasor is release of all, since result is same under any law); *Duffy Theaters Inc. v. Griffith Consolidated Theaters*, 208 F.2d 316 (10th Cir. 1953) (not expressly deciding whether federal or state law applies, although citing both, in holding that release of antitrust claims is not against public policy); *S. E. Rondon Co. v. Atlantic Richfield Company*, 288 F.Supp. 879 (C.D.

Cal. 1968) (unclear what law is applied in determining whether method of and reason for obtaining release agreement were against public policy); *Ayers v. Pastime Amusement Co.*, 240 F.Supp. 811 (E.D.S.C. 1965) (silent on applicable law to question of whether release of one joint tortfeasor is release of all); *Lawrence Capitol v. Stanley Warner Corp.*, 152 F.Supp. 889 (D. Mass. 1957) (unclear what law was applied in determining whether release of antitrust claim was obtained by fraud); *Michael Rose Productions v. Loew's Inc.*, 143 F.Supp. 606 (S.D.N.Y. 1956) (applicable law unclear, but apparently relying on New York decisions in finding that ". . . it is clear that the plaintiff in the case at bar has the right to present evidence tending to establish the following propositions:

* * * *

6". . . that the plaintiff did not intend to discharge the antitrust claim when it executed the release, but that defendants did attempt to include that claim in the release and that defendants concealed their own intention from plaintiff, knowing that plaintiff's understanding of the contents and effect of the release was that it embraced only the pending New York Supreme Court action."); *Michael Rose Productions v. Loew's Inc.*, 141 F.Supp. 257 (S.D.N.Y. 1956) (silent on applicable law to question of whether release should be reformed on grounds of mutual mistake); *Rector v. Warner Brothers Pictures*, 102 F.Supp. 263 (S.D. Cal. 1952) (unclear what law is applied to question of whether agreement was a covenant not to sue or a release).

4. *Cases applying State Law in Furtherance of Federal Policy:*

Novak v. General Electric Corp., 282 F. Supp. 1010 (E.D. Pa. 1967) (after finding it not in contravention of Federal policy, New Jersey law is applied to determine intention of the parties from all the facts and circumstances as well as the totality of the documents).